United Nations AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/991
13 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 991

Case No. 1123: SHAMSI

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Brigitte Stern; Mr. Omer Yousif Bireedo;

Whereas at the request of Issa Suleiman Shamsi, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 2000 the time-limit for the filing of an application with the Tribunal;

Whereas, on 5 February 2000, the Applicant filed an Application requesting the Tribunal to:

"a. [Rescind] the decision of termination.

b. [Reinstate the Applicant] to duty, and [consider] the period of cessation special leave with full pay.

c. [Pay to the Applicant] suitable compensation for expenses."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 January 1985, as an Area staff member with a temporary indefinite appointment as Personnel Assistant in the Syrian Field Office, Damascus. Effective 1 September 1988, the Applicant was promoted to the post of Assistant Field Personnel Officer and on 1 March 1992, he was transferred to the post of Field Administrative Services Officer.

Following a Board of Inquiry (BOI) investigation and report on corruption and dishonesty of UNRWA employees in the South Area, on 12 July 1995, the Officer-in-Charge of UNRWA Affairs advised the Applicant that his appointment was being terminated in the interest of the Agency, pursuant to Area staff regulation 9.1 and Area staff rule 109.1. The Applicant successfully appealed this decision to the Joint Appeals Board (JAB), and on 18 March 1997, the Commissioner-General reversed his decision to terminate the Applicant's services in the interest of the Agency.

Accordingly, on 25 May 1997, the Applicant was advised by the Field Administration Officer (FAO) that, as his previous post had been filled and there was no vacant post at his grade (grade 13), UNRWA was offering him reinstatement to the grade 12 post of Administrative Officer, Field Supply and Transport Department, with grade and salary protection at grade 13. Confirmation of the new post would, however, be subject to the successful completion of one year of satisfactory service. The Applicant accepted the offer and was reinstated with effect from 10 June 1997.

The Applicant subsequently appealed his reinstatement to a lower grade post to this Administrative Tribunal. In Judgement No. 931, *Shamsi & Abboud* (1999), the Tribunal found that, as the Respondent had accepted the JAB's recommendation in favour of the Applicant and had reinstated him, the application did not meet the criteria for admissibility contained in article 7 of the Statute of the Tribunal

In February 1998, the Field Supply and Transport Officer (FSTO) completed the Applicant's performance evaluation report (PER), finding his performance unsatisfactory in a number of areas. The FSTO noted on the PER that he had requested another evaluation be completed at the end of April. The PER was discussed with the Applicant on 17 February 1998. On 19 March 1998, the Applicant wrote to the FAO, stating his disagreement with his evaluation and requesting a transfer to the post he had occupied prior to his termination in 1995. The FAO informed the Applicant that his request could not be honoured as the post was occupied by another staff member.

On 8 June 1998, in the Applicant's second PER, the FSTO noted "[t]here has been NO improvement in [the Applicant's] performance since the last report". The PER was discussed with the Applicant on 8 June. The following day, the Field Personnel Officer (FPO) notified the Applicant that his probation would be extended for three months. On 12 June 1998, the Applicant challenged his evaluation and requested confirmation in his post. In response, the FSTO and Deputy FSTO met with the Applicant on 14 July 1998 and offered him an opportunity to improve his computer skills.

On 9 September 1998, the FSTO completed a third PER in which the Applicant's performance was again evaluated as unsatisfactory. On 10 September 1998, the FPO informed the Applicant that the Agency had decided to defer the Applicant's annual increment and confirmation of his appointment, and to extend his probationary period for a further three months. He advised the Applicant that, in the absence of a satisfactory PER at the end of this period, the Agency would have no alternative but to downgrade the Applicant or terminate his appointment in the interest of the Agency. The Applicant replied on 22 October 1998, alleging that the negative PER was the result of bias against him.

On 2 December 1998, the Applicant wrote to the FAO advising him that he wished to "opt for early voluntary retirement" effective 4 January 1999. On 3 December 1998, the FSTO completed the Applicant's fourth and final PER, which again reflected unsatisfactory performance. On 6 December, the Officer-in-Charge of UNRWA Affairs informed the Applicant that his appointment was being terminated in the interest of the Agency pursuant to Area staff regulation 9.1 and Area staff rule 109.1 with effect from 9 December 1998. He advised the Applicant that his request for early voluntary retirement effective 4 January 1999 could not be approved, but that a request for early voluntary retirement effective 9 December 1998 could be approved. The Applicant replied the following day that he would take early voluntary retirement effective 9 December 1998 but that he wished to reserve his right to appeal to the JAB.

On 4 January 1999, the Applicant wrote to the Director of UNRWA Affairs requesting that the decision be reversed. The Director replied on 13 January 1999, advising him that she had carefully reviewed his case and that his PERs indicated he failed to meet the requirements of his post. Accordingly, she confirmed "the decision to terminate [the Applicant's] services in the interest of the Agency and the subsequent conversion to Early Voluntary Retirement at [his] own request".

On 12 February 1999, the Applicant lodged an appeal with the Area JAB. The JAB adopted its report on 28 June 1999. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

25. ...

(a) The Board noted that the three periodic reports filled during the Appellant's probationary period were filled by only one person [namely] his principal supervisor and not his immediate supervisor. Moreover, the Board noted that his first periodic report was discussed with the Appellant in the presence of his immediate supervisor who did not participate in the evaluation.

(b) The Board also noted that the Administration contradicted itself when at first it refused to give him early voluntary retirement and then only after three days it accepted his option of early voluntary retirement.

(c) In this context, the Board is of the opinion that the Administration has acted within the framework of standing rules and regulations and that there is no bias or prejudice against the Appellant.

IV. RECOMMENDATION

26. In view of the foregoing ... the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the appeal be dismissed."

On 18 July 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him that he agreed with the JAB's conclusion that his appeal be dismissed.

On 5 February 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment in the interest of the Agency was both factually and legally flawed.

2. The Respondent deliberately kept documents from the JAB.

3. The Respondent erred in reinstating the Applicant on a probationary basis.

Whereas the Respondent's principal contentions are:

1. The application is non-receivable as, pursuant to Area staff rule 109.2, the administrative decision to terminate the Applicant's employment was withdrawn upon his acceptance of an early voluntary retirement option. Accordingly, there is no administrative decision to be appealed.

2. The Applicant separated from service by early voluntary retirement.

3. The Respondent did not err in refusing the Applicant's initial request for early voluntary retirement effective 4 January 1999.

4. The Respondent's decision to terminate the Applicant's appointment in the interest of the Agency was procedurally correct and not improperly motivated.

5. The Applicant bears the burden of proof in challenging a decision of the Respondent as procedurally defective or prompted by improper motive. The burden of proof in the instant case is heavier because the Applicant was terminated during his probationary period.

6. The Respondent did not err in reinstating the Applicant subject to satisfactory completion of a probationary period, nor did the Tribunal make such a finding in *Shamsi & Abboud*.

The Tribunal, having deliberated from 3 to 13 July 2001, now pronounces the following judgement:

I. The Tribunal considers that this application should be regarded as moot or otherwise so devoid of reality that it would not be appropriate to seek to determine the principal issue raised, i.e. whether the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency was valid and lawful. This situation arises because no action has been taken toward implementing that decision. On being informed of the decision, the Applicant chose to take early voluntary retirement effective 9 December 1998, which offer was accepted by the Respondent.

II. Prior to the decision of the Respondent on 6 December 1998 that the Applicant's appointment should be terminated in the interest of the Agency, the Applicant, in anticipation of yet another poor

performance evaluation and fearing that he was going to be dismissed (he says for reasons of prejudice and bias), had on 2 December 1998 applied for early voluntary retirement effective 4 January 1999.

The relevant Staff Regulations and Rules provide that a person taken on by the Agency on probation, should not be kept on probation for more than eighteen months. Personnel Directive A4/Part VII/Rev.7, paragraph 9.1 provides that "the total period of continuous probation shall not in any circumstances exceed eighteen months". Had the Applicant been allowed to stay on until 4 January 1999, that period of eighteen months would have been exceeded. In the circumstances (understandably as far as the Tribunal is concerned) the Agency declined to accept the Applicant's first offer to take early voluntary retirement effective 4 January 1999, as to have done so would have meant that it would have had to extend his employment beyond that period of eighteen months. This it was unwilling to do given its perception of the Applicant's performance. Instead it offered to accept an application for early voluntary retirement provided it came into effect within the eighteen-month period from the date on which he had been taken back into service.

III. The Applicant has claimed that his performance whilst re-employed by the Agency has been satisfactory and claims that the poor performance and evaluation reports stating otherwise were the result of bias and prejudice. This complaint has been rejected by the JAB. It was entitled to do so and the Tribunal sees no reason why it should alter that finding.

IV. The Tribunal is satisfied that the Applicant's appointment by the Agency ended because the Applicant had applied for early voluntary retirement and because that application had been accepted, and not because of the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency. The Tribunal rejects the Applicant's claim that his application for early retirement should not be considered as voluntary on the grounds that he had been coerced into proffering it by fabricated or falsified poor performance assessments and by unfounded criticisms and complaints relating to the performance of his work. Since the Applicant's appointment was terminated by his voluntary action rather than as the result of any wrongful act of the Respondent, there is no basis for the Applicant's claims and all relief sought is refused.

V. The facts that after the Applicant's retirement he requested review of the decision that he had been terminated in the interest of the Agency and sought that it be quashed or overturned, and that the Agency considered his request and rejected it, have no relevance to these proceedings. However, the Tribunal considers that had the Agency responded to that request by saying that it was moot this might have been more appropriate than by appearing to consider it and confirming the decision.

VI. As to the "additional documents" submitted by the Applicant late in the day and not seen by the JAB prior to concluding its deliberations and issuing its report, the Tribunal notes that the Applicant did not submit those documents to the Field Office for forwarding to the JAB until five days prior to the date on which he had been advised that the JAB hearing would be held. It took one week for the Field Office to forward the documents to the JAB. However, the Tribunal does not discern any sinister motive in that one week delay, but rather considers that the Field Office forwarded the documents in the ordinary course of business. Further, the Tribunal has considered the documents and is satisfied that even if they had been submitted with dispatch and transmitted in time, there is nothing contained therein which would have altered the findings of the JAB. In those circumstances, the Tribunal does not consider that the Field Office could have had any sinister motive by deliberately keeping the papers from the JAB as the Tribunal considers that nothing contained therein was either embarrassing to the Agency or would have harmed its case.

VII. As to the Applicant's claim that the Respondent had no power to take the Applicant back "on probation" (i.e. he was taken back subject to successful completion of one year of satisfactory service, and this probation was twice extended for periods of three months) the Tribunal is satisfied that this claim must fail. When the Respondent agreed on 18 March 1997, to accept the JAB recommendation of reinstatement, he had no obligation to act on that recommendation and when he chose to do so, it was on such terms as he saw fit. Furthermore, those terms proved acceptable to the Applicant, who accepted them and returned to the service of the Agency on the terms offered, which included a probationary period.

VIII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Brigitte STERN
Member

Omer Yousif BIREEDO
Member

Geneva, 13 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/992
13 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 992

Case No. 985: AYOUB

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President; Ms. Brigitte Stern;

Whereas, on 14 September 1999, Munib Tewfik Ayoub, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 31 January 2000, the Applicant, after making the necessary corrections, again filed an Application in which he requested, in accordance with article 11 of the Statute of the Tribunal, the revision of Judgement No. 889 rendered by the Tribunal on 4 August 1998;

Whereas the Application contained pleas requesting the Tribunal:

"1. (a) To order the Respondent to pay the Applicant his full entitlement to retirement benefits ([s]taff [r]ule 109.2) which he lost because of the Respondent's termination measure of 16 [December] 1995 against the Applicant, the measure which UNAT's Judgement [N]o. 889 of [4] [August] 1998 has [annulled].

(b) This entitlement of retirement benefits amounts to 20 months [net base salary at the rate in effect] he received in June 1995.

2. To order the Respondent to pay to the Applicant the interest on these retirement benefits from the date of [termination of] his services by the Respondent on 16 [December] 1995 when the Applicant should have received them, to the date he is issued these benefits. The interest is to be calculated on UNRWA interest rates.

3. To order the Respondent to pay the Applicant the amount of $3,000 (U.S.) for [counselling] fees, [secretarial] and other expenses."

Whereas the Respondent filed his Answer on 31 July 2000;

Whereas the facts in the case were set forth in Judgement No. 889.

Whereas the Applicant's principal contention is:

The Applicant should receive retirement benefits of 20 months net base salary. As the Tribunal ordered the rescission of his termination, he is entitled to retirement benefits of 30 months salary rather than the termination indemnity of 10.5 months salary he received.

Whereas the Respondent's principal contentions are:

1. The application is not receivable by the Tribunal. The issues set forth in the Application have "not been the subject of consideration and review by the Respondent's internal justice system".

2. The application is not an application for revision in accordance with article 11.

3. Even if the Application were to be considered as an application for revision, it is time-barred.

The Tribunal, having deliberated from 26 June to 13 July 2001, now pronounces the following judgement:

I. Following Judgement No. 889, dated 4 August 1998, the Applicant filed a new Application requesting, *inter alia*, full retirement benefits. In Judgement No. 889, the Tribunal ordered rescission of the decision to terminate the Applicant's appointment. The Tribunal further ordered that the Applicant be reinstated, or, alternatively, if the Commissioner-General decided in the interest of the Agency that the Applicant should be compensated without further action being taken in the case, that he be paid two years net base salary. The Applicant was paid two years net base salary. According to the Applicant, in view of the Tribunal's judgement, he is now entitled to a Retirement Benefit instead of the Termination Indemnity paid to him in 1995 on the termination of his appointment.

II. Under the applicable Regulations and Rules, internal remedies must be exhausted before an applicant can seek redress from the Tribunal. The Tribunal notes that the Applicant has not submitted the instant matter about additional compensation to the Respondent, or to the JAB as stipulated under article 7 of the Statute. Although the Applicant asserts that he has the right to bring this application directly to the Tribunal because it arises as a natural consequence of the Tribunal's orders in Judgement No. 889, established Tribunal jurisprudence mandates otherwise. The Tribunal has consistently held that it cannot consider questions that were not raised before the JAB. (See Judgements No. 519, *Kofi* (1991); and No. 555, *Selamawit Makonnen* (1992).) It is clear that applicants can seek redress from the Tribunal only as a last resort. This new Application, as such, is not receivable by the Tribunal because it has not been the subject of consideration and review by the Agency's internal justice system.

III. The Tribunal notes that, in effect, although the Applicant states otherwise, the Applicant's request could be considered a request for revision of Judgement No. 889, under article 11 of the Statute of the Tribunal, or possibly a request for interpretation.

IV. Article 11 stipulates that an applicant may apply for a revision of a judgement on the basis of the discovery:

> "... of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement."

The Tribunal notes that the Applicant first attempted to file an application concerning receipt of retirement benefits in September 1999, and filed his formal Application in January 2000. It also notes that the Respondent's decision to compensate the Applicant pursuant to Judgement No. 889 was communicated to the Applicant on 17 December 1998. Thus, a request for revision in the instant application would be time-barred under article 11. In any event, the Applicant makes no mention of a newly discovered fact, but requests the Tribunal to rule on his separation entitlements. In the view of the Tribunal, this request cannot be considered a valid request for revision.

V. The Statute of the Tribunal does not contain an express provision relating to the interpretation of judgements. However, the International Court of Justice in a 1954 advisory opinion held that competence to interpret is inherent in the judicial function, which it declared the Tribunal to possess. Subsequently the Tribunal itself held that it possesses the competence to consider a request for the interpretation of a judgement, citing as authority the 1954 advisory opinion of the International Court of Justice. (Judgement No. 61, *Crawford and Others* (1955).) Also, in Judgement No. 434, *Al-Ali* (1998) the threshold question before the Tribunal was whether an application could properly be characterized as a request for an interpretation of the Tribunal's final judgement, in which case it would be within its competence, or whether the application sought relief beyond that judgement on the basis of subsequent events, in which case it would not be within the competence of the Tribunal under article 7 of its Statute.

VI. The Applicant argues that because the initial decision to terminate his appointment was rescinded, he must be presumed to have had continuous service for thirty years, and that, therefore, he is entitled to a Retirement Benefit. As retirement benefits are calculated at one month of net base

salary per year of service, he seeks additional compensation of twenty months (initially he claimed 17 months).

The Tribunal's position in Judgement No. 889 is clear and unambiguous. The Tribunal provided the Commissioner-General with a choice to be exercised in the interest of the Agency. Either the Applicant was to be reinstated with full salary for the period since his separation or, if within 30 days the Commissioner-General decided that the Applicant would not be reinstated but instead compensated without further action being taken in his case, a fixed amount of compensation was to be paid. The Commissioner-General chose to compensate the Applicant "without further action being taken in his case", as contemplated in the third of the Tribunal's orders. By choosing this option the Commissioner-General decided not to reinstate the Applicant. Thus, the Applicant was not restored to his original position and was not entitled to receive "full payment of salary and emoluments from the date of his separation from service", including retirement benefits.

VII. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Second Vice-President

Brigitte STERN
Member

Geneva, 13 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/993
16 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 993

Case No. 1081: MUNANSANGU

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Spyridon Flogaitis; Mr. Omer Yousif Bireedo;

Whereas, on 21 June 1998, Mark Moono Munansangu, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1999 the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 February 1999, the Applicant again filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal

Whereas, on 7 May 1999, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read in part as follows:

(ii) Annul the decision … to separate the Applicant from service without notice (…).

(iiii) …, order the immediate reinstatement of the Applicant to his functions as Economic Affairs Officer of the United Nations Conference on Trade and Development (UNCTAD) with all salaries and related allowances and benefits from 4 June 1998 to the date of reinstatement.

(d) Amount of compensation in the event of a decision by the Secretary-General to pay compensation for the injury sustained:

In view of the loyal and excellent professional service rendered by the Applicant to the Organization as evidenced by his performance reports, the Tribunal is humbly requested to order payment of the following compensation:

(i) All salaries and related allowances and benefits until the date the Applicant will have reached the age of retirement.

In the alternative:

(ii) Payment of compensation calculated on the basis of the salary and allowances which the Applicant would have received had the date of termination been at the end of *three months notice* period in accordance with staff rule 109.3;

and

(iii) Payment of *termination indemnity* under [staff] regulation 9.3 and Annex III to the Staff Regulations calculated on the basis of the Applicant's gross salary less staff assessment in accordance with staff rule 109.4 and staff regulation 3.3 (b) (i).

(e) Other Relief Requested

The Tribunal is requested to order a lesser disciplinary measure than separation without notice under staff rule 110.3. Separation without notice and without indemnity compensation is cruel and unusual punishment to the Applicant in view of his loyal and excellent service to the Organization as evidenced by his performance evaluation reports.

Further, the Applicant's children are still in college and university in the United States and Canada and depend on him for fees and other financial support. Therefore, on humanitarian grounds, the Tribunal is humbly requested to grant the

Applicant compensation, *in particular 3 MONTHS SALARY AND ALLOWANCES AND TERMINATION INDEMNITY."*

Whereas the Respondent filed his Answer on 31 July 2000;

Whereas the Applicant filed Written Observations on 30 April 2001;

Whereas the facts in the case are as follows:

On 4 February 1981, the Applicant entered the service of UNITAR in New York as a Project Officer under a Special Fellowship. His fellowship expired on 31 December 1983, and on 1 January 1984 he began a two-year, fixed-term appointment with UNCTAD in Geneva as an Economic Affairs Officer at the P-3, step 3 level. At the expiration of his fixed-term appointment in January 1986, he received a probationary appointment as an Economic Affairs Officer at the P-3 level. His appointment was made permanent on 1 July 1986. The Applicant was dismissed without notice for serious misconduct on 4 June 1998. At the time of his separation from service, he was serving as an Economic Affairs Officer at the P-3, step 15 level.

Between 1987 and 1997, the Applicant was involved in a series of incidents, many of which were alcohol-related. These incidents included:

- Abusive telephone calls made to a colleague on 30 June 1987;
- Detention by the police on 15 April 1988, following complaints of "noise, scandal, altercation and drunkenness" from his neighbours;
- Attendance by the police on 13 April 1989, pursuant to a call from his wife;
- Driving under the influence of alcohol and traffic violations on 8 January 1990, for which the Applicant was fined 1,600 Swiss Francs;
- An incident at the International Telecommunication Union (ITU), his wife's place of employment, on 11 August 1991, which resulted in the Applicant's detention by the police and his subsequent banning of access to ITU.

The Organization learned of the Applicant's behaviour primarily from the police agencies involved, the UNOG security service and the Swiss Mission, rather than from the Applicant. On 15 October 1987, the Applicant was informed that the Geneva police department had notified the

Organization of the 13 September incidents and was warned that the acts were serious. He was asked to advise the Organization as to the outcome of the complaints against him, and to contact the UN Joint Medical Service. Following the 15 April 1988 incident, the Staff Counsellor met with the Applicant on 27 April 1988, and on 10 May 1988, the Applicant was reminded by the Chief, Personnel Administration Section, Personnel Service, UNOG, of his obligation to inform the Organization of such incidents, asked to avoid infringing the Organization's interests, and further admonished that he needed to set himself a higher standard of conduct. His attention was drawn to the Standards of Conduct again in a memorandum from the Senior Legal Officer, Legal Liaison Office, UNOG, on 14 December 1988, after the Applicant claimed that the motorcycle accident on 27 September 1988 was a private matter which should not have been brought to the Organization's attention. On 15 August 1991, the Chief, Personnel Service, UNOG, wrote to the Applicant concerning the 11 August 1991 incident at ITU. He drew the Applicant's attention to the serious nature of the incident and noted that this was not the first incident about which the Organization had been advised.

Between 1987 and 1995, the Applicant was treated for his alcoholism on a number of occasions.

The Organization was also made aware of a series of unpaid debts incurred by the Applicant. On 6 October 1992, the Organization was contacted by a debt collection agency acting on behalf of the Applicant's former doctor, after he failed to honour an agreement to pay a debt of 2,154 Swiss Francs. On 28 March 1995 and 25 January 1996, it was informed that the Applicant owed outstanding fees to the International School, Geneva, Quinnipiac College, United States, respectively. On 30 April 1996, a debt collection agency advised the Organization that judgement had been entered against the Applicant for a debt owed to Mayfield School in the United Kingdom. On 4 August, several unpaid medical bills were brought to the attention of the Organization.

On 26 August 1996, the Chief, Personnel Service, UNOG, informed the Applicant that, in light of the criminal conviction he received following the incident on 21 January 1995, his continued indebtedness to third parties, the lack of proof that he was providing financial support to his family, and the numerous incidents which had occurred, a preliminary investigation was being launched in accordance with administrative instruction ST/AI/371, entitled "*Revised Disciplinary Measures and*

Procedures, of 2 August 1991. The Chief, Personnel Service, UNOG, sent the findings of this preliminary investigation to the Assistant Secretary-General for Human Resources Management on 5 May 1997. On 19 June 1997, the Chief, Administrative Law Unit, informed the Chief, Personnel Service, UNOG, that the Assistant Secretary-General for Human Resources Management agreed that the Applicant should be placed on special leave with full pay pending investigation and disciplinary action. The Applicant was informed of this decision, along with the allegations against him, on 23 June 1997 by the Chief, Personnel Service, UNOG.

On 29 August 1997, the Chief, Administrative Law Unit, informed the Chief, Personnel Service, UNOG, that the Secretary-General had decided to refer the Applicant's case to the Joint Disciplinary Committee. This decision was communicated to the Applicant by the Chief, Personnel Service, UNOG, on 22 September 1997.

The Joint Disciplinary Committee (JDC) adopted its report on 7 May 1998. Its conclusions and recommendation read as follows:

> "CONCLUSIONS AND RECOMMENDATION
>
> 143. The Panel **concludes** that the staff member has breached [A]rticle 101 of the United Nations Charter, paragraphs 53, 54 and 55 [of the Report] o[n] the Standards of Conduct [in the International Civil Service 1954, Coord/Civil Service/5 (1986 Edition)], and [administrative instruction] ST/AI/399 [entitled]"*Financial and Other Personal Obligations of Staff Members*" [of 14 December 1994].
>
> 144. The Panel therefore **recommends** to the Secretary-General that the staff member be **separated from service without** notice on the grounds of serious misconduct incompatible with the basic requirements to be met by a United Nations staff member."

On 1 June 1998, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JDC report and informed him as follows:

> "...
>
> ... In respect of the procedural issues raised, [the Secretary-General] has taken note of the Committee's finding that, in accordance with the relevant staff rules and administrative issuances, your case was no longer a medical matter but a disciplinary matter

relating to your conduct as an international civil servant, and that the Committee had competence to consider the charges brought against you.

The Secretary-General has taken note that the Committee has separated the charges against you into 'financial obligations' and 'personal conduct'. In respect of the charge relating to financial obligations, the Secretary-General has taken note of the Committee's finding that your non-fulfillment of your financial obligations, in spite of the assistance and repeated warnings provided by the Organization, constituted a flagrant violation of the administrative instruction on *Financial and Other Obligations of Staff Members*, ST/AI/399 of 14 December 1994, and that your alcohol problem did not excuse your actions. In regard to the charges concerning your personal conduct, the Secretary-General has taken note of the Committee's findings that you had exhausted the measures provided for in the administrative instruction on *Employee Assistance in Cases of Alcohol/Substance Abuse*, ST/AI/372 of 25 September 1991; that the serious incidents in which you were involved outside the Organization were relevant to a determination of your conduct as a staff member and could be used to support the charges against you; that your traffic violations and matrimonial conflicts and their ramifications, were relevant to a determination that your conduct was well below the standards set by the Report on Standards of Conduct; and that your professional conduct was indeed affected by your alcohol problem.

The Secretary-General has given careful consideration to the findings of the Committee, especially in the light of the sensitive issues involved, and he is in agreement with these findings. He has particularly taken note of the Committee's references to paragraph 6 of ST/AI/399 and paragraph 26 of ST/AI/372 dealing with the initiation of disciplinary measures after the exhaustion of other remedies. He has also noted that the provisions of ST/AI/372 are concerned with the effect of alcohol abuse on a staff member's behaviour as well as job performance. The Secretary-General is aware that, although you have been given every opportunity over an ample period of time, you have failed to correct your pattern of behaviour.

The Secretary-General is in agreement with the Committee's conclusion that you breached Article 101 of the United Nations Charter, paragraphs 53, 54 and 55 of the Report on Standards of Conduct, and ST/AI/399, *Financial and Other Personal Obligations of Staff members*. He is also in agreement with the Committee that your behaviour constituted serious misconduct incompatible with the basic requirements to be met by a United Nations staff member.

Based on the above findings and conclusions, and in accordance with the recommendation of the Committee, the Secretary-General has decided to separate you from service without notice pursuant to staff rule 110.3 (vii) with effect from close of business on the day you receive this letter.

In accordance with staff rule 110.4 (d), any appeal you might wish to file in respect of the above decision should be submitted directly to the Administrative Tribunal."

On 7 May 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JDC erred in its fact finding.

2. The Respondent erred in placing reports of the Staff Counsellors on their interaction with the Applicant in the dossier it submitted to the JDC.

3. The Applicant did not violate Article 101 of the UN Charter as his favourable performance reports attest to his diligence and loyalty.

4. The Applicant did not violate Article 53 of the Standards of Conduct as the incidents of misconduct alleged occurred within the privacy of his matrimonial home.

5. The Applicant's recovery process is progressing; he has been under the care of a doctor since May 1997 and there have been no further relapses.

6. The Applicant did not violate Articles 54 and 55 of the Standards of Conduct as his only violations of the laws of Switzerland and France were traffic violations.

7. The Applicant did not violate ST/AI/399 as his personal debts to outside claimants are primarily related to his children's education. Further, he has made arrangements to repay these debts by installment.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting dismissal. The Secretary-General's decision to dismiss the Applicant without notice for serious misconduct was a valid exercise of that discretionary authority.

2. The decision to dismiss the Applicant was based on facts adduced by the JDC and was not vitiated by mistake of fact, by lack of due process, prejudice or other extraneous factors.

3. The decision to dismiss the Applicant for serious misconduct was not disproportionate to the Applicant's misconduct.

The Tribunal, having deliberated from 29 June to 16 July 2001, now pronounces the following judgement:

I. The Applicant appeals the decision to separate him from service on the grounds of serious misconduct incompatible with the standards of conduct expected of a United Nations staff member. The Applicant claims that he did not violate the Staff Regulations and Rules, or standards of conduct. He further claims that the JDC erred in its findings.

II. The Applicant has a ten-year history of misconduct and alcohol abuse documented with the French and Swiss police, and the Organization. The series of incidents commenced with a complaint received by an UNCTAD staff member on 30 June 1987, concerning the Applicant's abusive calls to the complainant's home. During those calls, the Applicant appeared to be under the influence of alcohol. On 15 April 1988, the Swiss police detained the Applicant following complaints by neighbors in his apartment building. The Respondent reminded the Applicant on 10 May 1988 that he had a duty to report any arrests to the Organization and also put him on notice that his conduct was not consistent with that expected of an international civil servant.

In addition, on 19 September 1989, the Swiss Mission notified the Legal Liaison Office, UNOG, that the Applicant's Swiss driver's license had been suspended for two months after the police responded to a call from the Applicant's spouse on 13 April 1989 concerning domestic violence at the Applicant's home, and found the Applicant's children taking refuge on the balcony. In July 1991, he was involved in another violent, alcohol-related domestic disturbance.

On 15 August 1991, the Chief, Personnel Service, UNOG, wrote to the Applicant, informing him that an incident which had taken place at ITU on 11 August 1991, involving yet another drunken disturbance, could constitute grounds for disciplinary action, and requested him to provide an explanation. The Applicant informed the Organization that he continued to seek alcohol

dependency treatment. Subsequently, there were several other incidents of alcohol-related domestic violence, and verbal harassment of staff members culminating on 23 June 1997 when the Applicant was charged with misconduct and suspended with pay pending completion of disciplinary proceedings. The Applicant responded to the charges on 9 July 1997.

III. The JDC found that the Applicant's professional conduct had been affected by his alcohol problem and that the Applicant had breached various rules and regulations, and recommended to the Secretary-General that the Applicant be separated from service without notice on the grounds of serious misconduct. On 4 June 1998, the Secretary-General decided to separate the Applicant from service, without notice, pursuant to staff rule 110.3 (vii).

IV. The Applicant seeks to rescind the Respondent's decision to dismiss him for serious misconduct. Article 100, paragraph 1, and Article 101, paragraph 1, of the Charter set forth the basic obligations of the Secretary-General and staff to the Organization and the Organization's responsibility for appointment of staff. The Tribunal has repeatedly affirmed that the Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required standards of conduct. The choice of disciplinary measure to be imposed pursuant to staff regulation 10.2 falls within the Secretary-General's discretionary powers. (Judgements No. 515, *Khan* (1991); No. 542, *Pennacchi* (1991); No. 941, *Kiwanuka* (1999).) The Tribunal finds that the Respondent's actions did not fall outside the scope of its broad discretionary powers and that the Respondent provided ample opportunities and assistance for the Applicant to rehabilitate himself. Staff members have a duty to maintain a high standard of conduct even in matters unconnected with their official duties. The International Civil Service Commission Report, paragraph 53, cited by the JDC, states that a staff member "must bear in mind that his personal conduct, whether connected or unconnected with official duties, must be such that it will not infringe upon any demonstrable interests of the organization he serves, bring it into discredit, or offend the community in which he lives".

The JDC found that the Applicant's conduct failed to meet the highest standards of conduct required of staff members. Based on a ten-year history of abuse where the Organization and the

French and Swiss police had to intervene, the Tribunal finds that the Respondent's actions of dismissal were not only reasonable but also necessary.

V. The Tribunal finds the Secretary-General's dismissal of the Applicant was a valid exercise of his discretionary power. The Tribunal has consistently maintained that its competence to review the Secretary-General's discretionary powers to discipline staff is confined to determining whether the Secretary-General's actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See Judgements No. 490, *Liu* (1990); No. 515, *Khan* (1991); and No. 616, *Sirakyan* (1993).)

In disciplinary cases, the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any procedural irregularity; (iv) whether there was an improper motive or abuse of purpose; (v) whether the sanction is legal; (vi) whether the sanction imposed was disproportionate to the offence; (vii) and, as in the case of discretionary powers in general, whether there has been arbitrariness (See Judgements No. 898, *Uggla* (1998); No. 941, *Kiwanuka* (1999).)

The Tribunal finds that all appropriate procedures were followed in this case.

VI. In conclusion, the Tribunal holds that the Secretary-General exercised reasonable and necessary discretion under the Staff Regulations and Rules by concluding that the Applicant had engaged in serious misconduct and that he failed to meet the highest standards of conduct expected of an international civil servant. Further, the Tribunal holds that the Secretary-General did not violate the Applicant's rights of due process by dismissing him without notice.

VIII. For the foregoing reasons, the Tribunal rejects all pleas in their entirety.

(Signatures)

Mayer GABAY
President

Spyridon FLOGAITIS
Member

Omer Yousif BIREEDO
Member

Geneva, 16 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/994
16 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 994

Case No. 1038: OKUOME

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 12 November 1997 and 21 April 1998, Andrew Adipo Okuome, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 August 1998, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

"II. PLEAS

1. ... [M]y dismissal ignored due process procedure as laid down by staff rule 110.4 and UNICEF's own Administrative Instruction CF/AI/1990-5 of 17th September 1990, para. 4.1 (a) and I therefore plead it should be rescinded ... [M]y suspension violated the requirements in staff rule 110.2 under which I was suspended. The irregular suspension prejudiced my defence. (...)

2. Based on the fact that UNICEF misused staff rule 110.2 under which my suspension was effected without following the procedure as laid down in that staff rule I plead that my suspension and subsequent dismissal was ill motivated, biased,

prejudiced, based on mistaken facts, violated due process and [was] discriminatory and I therefore plead that it is nullified.

3. ... [S]taff rule 110.4 and UNICEF Administrative Instruction CF/AI/1990-5 referred to above, in particular, required UNICEF to share with me documents ... UNICEF failed to do this ... UNICEF [New York Headquarters] insisted I was given the documents which I did not get and UNICEF Regional Office also stated, in their letter of 3rd August 1995 ... that I did not get the documents ... I therefore plead that UNICEF should state and produce who gave me the documents instead of confusing situation by contradicting their own Regional Office which was dealing with the case. This being the case I plead the dismissal is nullified.

4. Under staff rule 109.10 (a) (v) ... [the] cut off date for payment of salary, allowance and benefits is the date of dismissal. I plead that UNICEF is ordered to pay me up to 10th April 1996. My dismissal date was 11th April 1996 ... I kindly request for an immediate order on this before hearing my case ...

5. Noting the gravity and the financial injury UNICEF subjected me to over a long period ensuring all actions on my case were severely delayed and that justice delayed is justice denied, I plead that compensation to me should be not less [than] five years of base salary and allowances. I was suspended for 17 months instead of 3 allowed.

6. ... [T]ermination of my service without following due process was harsh, cruel and inconsiderate and the damage I suffered as a result of negative press publications [is] irreparable hence my plea that I should be paid five years salary."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the Applicant filed Written Observations on 17 October 2000 and on 8 June 2001;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF at the Kenya Country Office on 1 November 1989 as an Assistant Administrative and Finance Officer at the NO-B level, on a six-month fixed-term appointment. He was promoted to the position of Administrative and Finance Officer at the NO-C level on 1 January 1990. On 1 November 1993 he was granted a permanent appointment. He was summarily dismissed effective 11 April 1996.

On 14 December 1994, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, notified the Applicant that, pending completion of an audit of the Kenya Country Office he was being suspended with full pay. As the preliminary findings suggested serious mismanagement and

possibly fraud within the office, the reason given for the suspension was to avoid interference, "intentional or unintentional, with the activities of the auditors or of their access to evidence".

On 3 May 1995, the Director, Division of Personnel, UNICEF, transmitted a copy of the Internal Audit Report dated 20 April 1995, to the Applicant, and advised him that he was being charged with serious misconduct and suspended without pay. The Audit Report concluded, *inter alia*, that the Applicant had been grossly negligent, had allowed irregular financial activities to take place for his own personal benefit and had been implicated in extorting money from other staff members.

On 16 May 1995, the Applicant requested a series of documents he claimed were necessary in order to prepare his defense. On 9 June 1995, the Applicant replied to the charges against him and complained that he had not given access to all the documents requested. On 28 June and 3 August 1995, he received additional documents. He submitted his reply on 7 August 1995.

On 25 March 1996, the Applicant was informed that the Executive Director had decided to dismiss him for serious misconduct in accordance with the second paragraph of staff regulation 10.2.

The Applicant requested review of the decision, on 7 June 1996. On 5 March 1997, the Director, Division of Human Resources, UNICEF, advised the Applicant that his request had been referred to an *ad hoc* Joint Disciplinary Committee (JDC) constituted at Headquarters.

By memorandum on 19 September 1997 the JDC reported its findings and conclusion to the Executive Director which read, in part, as follows:

> "**(1) Approval of Fraudulent Disbursement**
>
> ...
>
> The JDC notes that while the Appellant does not deny that these disbursements were highly irregular, he refuses to take any responsibility for having approved them. While it is true that these disbursements should have been checked at every level, this does not excuse him from his own gross negligence.
>
> **(2) Overpayment to Suppliers**
>
> ...

[The] JDC notes that as Finance Officer, the Appellant should have denied, or at least questioned, payments without correct supporting documentation. By not doing so, the Appellant demonstrated a serious lack of competence in the performance of his duties.

(3) MIP Falsifications

...

The JDC notes that the Appellant is not accepting the responsibility that comes with his role as Financial Officer. If he had the slightest suspicion that these claims were not genuine, he should have investigated further and advised the Representative. While the Appellant may not have profited personally from these fraudulent transactions, his acceptance and consequent certification of these claims constitutes gross negligence on his part.

(4) Irregular Opening of Local Bank Accounts

...

The JDC notes that the normal procedure would be a wire transfer from bank account to bank account or a request to open a new bank account, and that while the Appellant may not have personally profited from this transaction, the method used was highly irregular and against proper procedure. The JDC also notes that the Appellant took this action despite having been told by the Auditors in 1994 to discontinue this practice.

(5) Replenishment of Sub-Office Bank Accounts

... The JDC notes that despite being told in 1994 by the Auditors that he must follow the correct procedures, the Appellant continued this irresponsible practice.

(6) Improper Use of PAR System

...

The JDC notes that ... the Appellant, as Finance Officer, at a minimum, should have put in place sufficient internal controls so that he does not personally handle his own PAR account. This practice clearly contravenes UNICEF rules. The Appellant should also, at a minimum, have alerted the Auditors to the chaotic state of the PAR system; his failure to do so constitutes negligence.

(7) Other Charges

Two other charges, one referring to **Travel Activities**, and the other, to **Obstruction of Audit**, were also discussed extensively. The general conclusion remains that the

Appellant's conduct shows total abnegation of the financial control which is a key function of his post. At a minimum, the Appellant was irresponsible and grossly negligent.

Conclusion

It is regrettable that there has been such a long period from when the Appellant was actually charged (May 1995) to the time of his actual dismissal (March 1996). The unusual workload brought on by the KCO [Kenya Country Office] audit obviously explains but hardly justifies this delay. In the actual charges brought against the Appellant, the *ad hoc* JDC discerns a clear pattern of gross negligence and misconduct. In conclusion, we advise the Executive Director that no further review of this case is warranted."

On 8 October 1997, the Executive Director, UNICEF, transmitted to the Applicant a copy of the *ad hoc* JDC report and informed him as follows:

"...

I have re-examined the decision to summarily dismiss you in light of the Committee's report and have taken note of its conclusion that no further review of your case is warranted. I have decided to accept the Committee's recommendation and to maintain your summary dismissal."

On 27 August 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The suspension and subsequent dismissal were ill motivated, biased, prejudiced, based on mistaken facts, discriminatory and in violation of due process.

2. UNICEF failed to comply with the Staff Regulations and Rules. The suspension letter failed to specify the regulation under which it was administered.

3. UNICEF failed to supply the Applicant with the pertinent documents necessary to prepare and present a proper defense.

4. The long delay in disposing of the Applicant's case constituted a denial of justice and a violation of the Staff Regulations and Rules, requiring rescission of the decision to dismiss the Applicant.

5. The *ad hoc* JDC ignored the Applicant's defense.

6. The applicable rules mandate that the cut-off date for payment of salary, allowance and benefits is the date of dismissal.

Whereas the Respondent's principal contentions are:

1. The Executive Director of UNICEF has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting summary dismissal. Her decision to summarily dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive or procedural irregularity, improper motive, or any other extraneous factor.

2. The Applicant failed to meet the standard of conduct required of international civil servants.

3. The Applicant's rights of due process were respected.

4. The Applicant is not entitled to salary payments from 3 May 1995, the date on which he was suspended from service, until the date of his summary dismissal.

The Tribunal, having deliberated from 2 to 13 July 2001, now pronounces the following judgement:

I. The Applicant appeals the decision to dismiss him summarily from service for serious misconduct. The Applicant claims that his summary dismissal was improperly motivated, procedurally deficient, discriminatory in nature, and taken in disregard of his rights of due process and the procedures set forth the Staff Regulations and Rules.

II. The case concerns the imposition of a disciplinary sanction. In its longstanding jurisprudence on the issue of disciplinary measures, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and … its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision". (See Judgements No. 210, *Reid* (1976), para. III; and No. 300, *Sheye* (1982), para. IX.) In disciplinary cases, the Tribunal examines

(i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct or misconduct, (iii) whether there has been substantive irregularity, (iv) whether there was an improper motive or abuse of discretion, (v) whether the sanction is legal, and (vi) whether the sanction imposed was disproportionate to the offense. (See Judgements No. 890, *Augustine* (1998); and No. 941, *Kiwanuka* (1999).)

III. On 14 December 1994, on the basis of preliminary findings of an audit investigation of the Kenya Country Office, Ms. Sham Poo, the Deputy Executive Director, UNICEF, notified the Applicant that he was being suspended with full pay, pending completion of the audit investigation. Subsequently, on 3 May 1995, upon completion of the audit investigation, the Applicant was provided with the Internal Audit Report. Based on the findings contained in the Report, the Applicant was charged with serious misconduct and suspended without pay. Effective 11 April 1996, the Applicant was summarily dismissed.

The case was submitted to an *ad hoc* JDC, which found that the Applicant's conduct "showed abnegation of the financial control which [was] a key function of his post" and that "[a]t a minimum, the [Applicant] was irresponsible and grossly negligent".

Based on the recommendation of the JDC, the Executive Director, UNICEF, decided to maintain the Applicant's summary dismissal.

IV. The Applicant claims that the case should have been referred to the JDC prior to his summary dismissal. This is not supported by staff rule 110.4 (b), which provides that no advice of a JDC shall be required, "in respect of summary dismissal ... in cases where the seriousness of the misconduct warrants immediate separation from service". Furthermore, the Tribunal has rejected the argument that cases involving summary dismissal for serious misconduct must be referred to the JDC, and has confirmed that "neither staff regulation 10.2 nor staff rule 110.3 (a) require such a referral". (See Judgement No. 424, *Ying* (1988), para. XII.)

Furthermore, the Tribunal has consistently held that an applicant bears the burden of proving prejudice or other improper motive. (See Judgements No. 465, *Safavi* (1989); No. 479, *Caine* (1990) and No. 515, *Khan* (1991).) In this case, the Applicant did not submit any proof that the review process was vitiated by procedural irregularity and, therefore, did not meet his burden.

V. The Applicant contends that he is entitled to receive a salary, allowances and benefits from the date on which he was suspended without pay until the date of his summary dismissal. According to staff rule 110.2 (c), "[i]f a suspension ... is without pay and the charge of misconduct is subsequently not sustained, any salary shall be restored". The Tribunal finds that, as the Applicant was summarily dismissed for serious misconduct, he has no right to have his salary restored. In addition, the Tribunal finds that, while a decision to suspend a staff member without pay is a harsh measure, in light of the exceptional circumstances of this case such a decision fell within the discretion of the Executive Director. Therefore, the Applicant's claim on these grounds fails.

VI. The Applicant claims that his suspension from 14 December 1994 until his summary dismissal on 11 April 1996 violated the three-month limit imposed by staff rule 110.2, since he was suspended for nearly 17 months. The Tribunal notes that the Applicant was initially suspended with full pay but that from 3 May 1995, the date on which he was charged with misconduct, until 11 April 1996, he was suspended without pay. Staff rule 110.2 stipulates that a "staff member may be suspended from duty during investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months". The Tribunal has held that "although the staff rule speaks of suspensions 'normally' not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires", and "[i]t is entirely proper for the Organization to be alerted to the possibility or the appearance of ... corrupt practices, ... and to investigate fully whenever it appears that such misconduct may have occurred". (See Judgement No. 615, *Leo* (1993).)

The Respondent claims that, as the charges in this case were of a serious nature and were sufficiently documented to constitute "exceptional circumstances" within the purview of staff rule 110.2, suspension without pay was appropriate in this case. The Tribunal has stated, "in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances". (See Judgement No. 941, *Kiwanuka* (1999).) While the Tribunal finds that the allegations of serious misconduct warranted a thorough investigation, and notes that the findings of the audit investigation led to the suspension of 25 staff members in addition to the Applicant, it finds that the time taken to complete the disciplinary proceedings was exaggerated and unduly prolonged. The fact that 25 other staff members were

involved does not justify keeping the Applicant without means of support for such a lengthy period of time.

VII. In conclusion, the Tribunal holds that the Executive Director of UNICEF exercised reasonable and necessary discretion under the Staff Rules by concluding that the Applicant failed to meet the highest standards of integrity required by a staff member and that his conduct constituted serious misconduct. Further, the Tribunal holds that the Secretary-General did not violate the Applicant's due process rights by summarily dismissing him. However, in light of the Respondent's prolonged delay in concluding the disciplinary proceedings while keeping the Applicant suspended without pay, the Tribunal awards the Applicant compensation of three months net base salary.

VIII. In view of the foregoing, the Tribunal:

(i) Orders the Respondent to pay the Applicant compensation of three months net base salary at the rate in effect on the date of his separation from service.

(ii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 16 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/995
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 995

Case No. 959: FACCHIN

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President; Mr. Omer Yousif Bireedo;

Whereas, on 22 December 1999, Brigitte Facchin, a former staff member of the United Nations, filed an Application in which she requested, in accordance with article 11 of the Statute of the Tribunal, the revision of Judgement No. 919, rendered by the Tribunal on 23 July 1999;

Whereas the Application contained pleas which requested the Tribunal to:

"1. Revise Judgement [No.] 919 as per the details in my letter to the [Tribunal] ..., and

2. As in the original application submitted to the [Tribunal] in January 1997 and all correspondence addressed to the [Tribunal]."

Whereas the Respondent filed his Answer on 25 February 2000;

Whereas, on 1 March 2001, the Applicant submitted an additional statement;

Whereas the facts in the case were set forth in Judgement No. 919.

Whereas the Applicant's principal contentions are:

1. The destruction of the reports by Security and Training, United Nations Office at Geneva (UNOG), which constituted the legal basis for the actions taken by the Administration against the Applicant, prevented her from rebutting the reports or properly preparing her case.

2. The Tribunal's Judgement was based on erroneous findings.

3. The Tribunal erred in finding her application time-barred.

4. The Tribunal erred in not considering the Administration's undue delay in processing her claims.

5. The President of the Tribunal may not have been objective in acting as Presiding Officer in her case.

Whereas the Respondent's principal contention is:

The application for revision fails to introduce any fact of a decisive nature which was unknown to the Tribunal and also to the Applicant at the time of the judgement.

The Tribunal, having deliberated from 27 June to 23 July 2001, now pronounces the following judgement:

I. The Applicant has filed a request for revision of Judgement No. 919, dated 23 July 1999. In Judgement No. 919, the Tribunal found the Application to be time-barred insofar as the decision not to renew the Applicant's contract was concerned and remanded the claims regarding an incident that took place on 4 July 1994 to the Joint Appeals Board (JAB).

II. Article 11 of the Statute of the Tribunal provides that an applicant may apply for a revision of a judgement on the basis of the discovery:

> "...of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement."

III. The Tribunal notes that the Applicant's principle contention is that the destruction of the reports by Security and Training, UNOG, which constituted the legal basis for the actions taken by the Administration against the Applicant, prevented her from rebutting the reports or properly preparing her case. Furthermore, she contends that Judgement No. 919 is based on erroneous findings and on incomplete and misleading statements.

IV. The points raised by the Applicant are more closely associated with the incident of 4 July 1994 than with the renewal of her contract. This is evident from the documentation provided by the Applicant regarding her authorization to attend the course on Russian Language. The Tribunal has already decided that the claims relating to that incident should be remanded back to the JAB. Thus, the Applicant may file a new application with the Tribunal on the merits after receiving the decision of the Secretary-General in that case, in accordance with the provisions of article 7 of the Statute.

V. The Applicant further contends that the Judgement was based on erroneous findings as a number of incorrect, incomplete and misleading statements were included in the fact section of the Judgement. In this regard, the Tribunal takes note of the fifth paragraph of the fact section, as follows:

> "On 10 August 1994, the Chief, Personnel Section, UNCTAD, responded to queries by the Chief, ECE, concerning the renewal of the Applicant's contract, stating that the *latter* had already been "informed ... that [the Applicant's] contract would not be extended beyond close-of-business on 15 July 1994..." (emphasis added).

The use of the term "latter" implies that the Applicant was the addressee of the memorandum. The original memorandum stated, *inter alia*, "I [the Chief, Personnel Section, UNCTAD] understand that the Director of UNOG Division of Administration has already informed you [the Chief, ECE] that [the Applicant's] contract would not be extended". Thus, it is clear that the addressee of the memorandum was the Chief, ECE, and not the Applicant. The Tribunal orders that the appropriate correction be made in the Judgement.

VI. With regard to the request that the Tribunal revise its finding that the application was time-barred insofar as the decision not to renew her contract was concerned, the Applicant makes no mention of a newly discovered fact, but requests the Tribunal to rule again on the time-bar. In the view of the Tribunal, this request cannot be considered a valid request for revision. In this connection, the Tribunal recalls its Judgement No. 894, *Mansour* (1998), paragraph II, where it has clearly stated that "[u]nder its Statute, the Tribunal's powers of revision of a judgement are strictly limited and may be exercised only upon compliance with the conditions set forth in article 11. No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation". The Statute does not provide for appeals of Tribunal judgements.

VII. Finally, the Tribunal dismisses the argument that the President of the Tribunal might have negatively influenced the outcome of the Applicant's case. The Tribunal considers it only natural that the President was unpleasantly surprised to discover a document in his office, which had been placed there by the Applicant instead of having been addressed to him through the Executive Secretary of the Tribunal. There is no reason to question the objectivity of the President presiding in the Applicant's case.

VIII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Vice-President

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/996
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 996

Case No. 992: ZIADEH

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Omer Yousif Bireedo;

Whereas, on 19 September 1999, Samih Ziadeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an Application in which he requested, in accordance with article 11 of the Statute of the Tribunal, the revision of Judgement No. 906 rendered by the Tribunal on 20 November 1998;

Whereas the Application contained pleas requesting the Tribunal:

"1. To order that the Respondent's decision to terminate my service be rescinded, and to order my reinstatement.

2. To order that the period from 6 March 1996 to the day of this order [is] with full pay;

OR:

In case of the [i]nability of my reinstatement:

1. To consider this case as an exceptional one.

2. To order compensation [in] the [a]mount of 177,408 US dollars the usual pay for 14 [year's] ... until [I] reach the age of retirement.

3. To order compensation for moral and psychological distress [in] the amount of 50,000 US dollars."

Whereas the Respondent filed his Answer on 6 February 2000;

Whereas the facts in the case were set forth in Judgement No. 906.

Whereas the Applicant's principal contentions are:

1. The amount of compensation awarded by the Tribunal in Judgement No. 906 was insufficient.

2. The Tribunal should reconsider its decision and either order reinstatement with back pay or award increased compensation.

Whereas the Respondent's principal contentions are:

1. The Application does not fulfil the preliminary requirements of an application for revision under article 11.

2. The Application does not identify the discovery of any fact, let alone a decisive fact, which was unknown to him and to the Tribunal at the time when the judgement was given.

3. The Application is a restatement of the Applicant's original application in case No. 992.

The Tribunal, having deliberated from 27 June to 23 July 2001, now pronounces the following judgement:

I. Following Judgement No. 906, dated 20 November 1998, the Applicant has filed a new Application requesting, *inter alia*, reinstatement and back pay from the date of his termination on medical grounds to the date of this judgement, or additional compensation for moral and psychological distress. In Judgement No. 906, the Tribunal ordered the Respondent to pay the Applicant compensation in the amount of two years net base salary, which he did. According to the Applicant, the amount of compensation was much less than expected and does not meet his requirements. He does not agree with the decision of the Tribunal and asks it to reconsider the amount of compensation awarded.

II. The Statute of the Tribunal contains no provision for appeals of its judgements. There is no power in the Tribunal to rehear applications on *ad misericordium* grounds or to alter earlier decisions merely because the Applicant is dissatisfied with the outcome. Accordingly, this application is not receivable on the grounds advanced by the Applicant.

III. The Tribunal considers, although the Applicant does not state this in so many words, that the Applicant's request could be taken as a request for revision of Judgement No. 906, under article 11 of the Statute of the Tribunal.

Article 11 stipulates that an applicant may apply for a revision of a judgement on the basis of the discovery:

> "... of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement."

The Tribunal notes that the Applicant makes no mention of such a newly discovered fact, but requests the Tribunal to rule again on his entitlements. In the view of the Tribunal, this request cannot be considered a valid request for revision. In this connection, the Tribunal recalls its Judgement No. 894, *Mansour* (1998), paragraph II, where it clearly stated that "[u]nder its Statute, the Tribunal's powers of revision of a judgement are strictly limited and may be exercised only upon

compliance with the conditions set forth in article 11. No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation".

IV. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Spyridon FLOGAITIS
Member

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/997
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 997

Case No. 1109: VAN DER GRAAF

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Richard van der Graaf, a former staff member of the United Nations Office at Vienna (hereinafter referred to as UNOV), the President of the Tribunal, with the agreement of the Respondent, extended until 31 May, 31 August and 30 November 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 November 1999, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

...

2. On the merits, the Applicant respectfully requests the Tribunal *to find*:

(a) That the decision of the Secretary-General to demote him to D-1, communicated to [the Applicant] on 28 December 1998 by letter of ..., [the]Under-Secretary-General for Management dated 16 December 1998, was based on grounds that had not been alleged;

(b) That the actions of [the Applicant] in defending himself against the allegations in this case did not constitute abuse of authority;

(c) That the JDC [Joint Disciplinary Committee] violated the applicable procedures to the detriment of [the Applicant] by not including in the report a synopsis of the evidence;

(d) That the recommendation of the JDC was based in part on evidence not made available to [the Applicant];

(e) That OIOS [Office of Internal Oversight Services] failed to make a proper investigation before it submitted its report of 13 January 1998 recommending the commencement of disciplinary procedures against [the Applicant] and that, as a result, [the Applicant] was suspended for an entire year with adverse professional and emotional consequences;

(f) That the actions taken by the United Nations at the time of [the Applicant]'s suspension and immediately thereafter were unnecessarily public and harsh.

3. Whereafter the Applicant most respectfully requests the Administrative Tribunal *to order*:

(a) The rescission of the decision of the Secretary-General to demote [the Applicant] in rank from D-2 to D-1, conveyed to [the Applicant] in the letter of [the Under-Secretary-General for Management], dated 16 December 1998;

(b) The payment of $50,000 compensation for the public humiliation and emotional damage arising out of the actions of the United Nations in connection with the investigation and at the time of [the Applicant]'s suspension and immediately thereafter."

Whereas the Respondent filed his Answer on 14 July 2000;

Whereas the Applicant filed Written Observations on 12 September 2000, and on 6 October 2000, the Respondent provided his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 14 April 1967, on a one-year intermediate term appointment as an Associate Expert for Urban Community Development at the Department of the Municipal Council, Chingola, Zambia. His appointment was extended several times and became permanent on 1 February 1980. At the material time, the Applicant held the

position of Director, Division of Administration and Common Services, UNOV, at the D-2 level, and was also in charge of the administration of the Centre for International Crime Prevention, and the United Nations Drug Control Programme (UNDCP).

On 26 June 1997, a junior professional staff member employed by UNDCP sent a memorandum entitled "The corruption, abuse of power and sexual harassment of [the Applicant]" to the Under Secretary-General for Internal Oversight Services. The junior professional complained that the Applicant had sexually harassed and intimidated him, had extorted goods, services, favours and money from him, and had attempted to destroy the career of the junior professional's wife. The junior professional claimed that he had been subject to abuse for two years but had not reported it earlier because of the Applicant's high position and constant references to his close ties to senior management.

The Office of Internal Oversight Services (OIOS) proceeded to conduct an investigation and submitted its report to the Director-General, UNOV, on 13 January 1998. The report stated that the Applicant had continually denied any relationship with the junior professional other than that of "unofficial counselor" until the final interview, when OIOS investigators played the Applicant a cassette which the junior professional had used to secretly record a conversation between himself and the Applicant. Upon hearing the tape, the Applicant volunteered that he and the junior professional were in love with each other. OIOS had found no evidence of a reciprocal relationship and concluded that the Applicant had "violated Staff Rule 110.1, relating to misconduct ..., in that he improperly and repeatedly sought a sexual relationship with the complainant, even when his advances had been regularly rejected over a two year period". It further concluded that the Applicant had retaliated against the junior professional in contravention of Secretary-General's Bulletin ST/SGB/273 of 7 September 1994, by lodging charges against him in October 1997 and by "improperly using UNOV staff and resources to attempt to discredit [him]". The report recommended the initiation of disciplinary proceedings for serious misconduct against the Applicant as well as his suspension on full pay pending the outcome of the proceedings.

On 19 January 1998, the Under-Secretary-General for Management advised the Applicant that he would be placed on "suspension with pay with effect from receipt of this letter", and that allegations of misconduct would be submitted to him shortly. On 20 January

1998, the Applicant was asked by the Deputy to the Director-General, who was accompanied by three other staff members, "to surrender [his] grounds pass". He was subsequently asked to leave the premises of UNOV and was escorted out of the building by security officers.

On 22 January 1998, a German newspaper, "Die Presse", citing the Spokesman of the Director-General, UNOV, reported that a high-ranking UN Official had been suspended following accusations of sexual harassment of a male colleague. This was followed by a press release from the UN Information Service, Vienna, which identified the Applicant by name and position.

Also on 22 January 1998, the Assistant Secretary-General, Office of Human Resources Management (OHRM), presented the Applicant with allegations of misconduct, charging him with "abuse of [his] authority, sexual harassment of [the junior professional], and retaliatory action against [the junior professional]". She invited him to respond to the charges within two weeks.

On 20 July 1998, the Assistant Secretary-General, OHRM, referred the case to the Chairperson, JDC, in Geneva. At the request of the Applicant, however, the Under-Secretary-General for Management decided, on 6 August 1998, that the case be transferred to "a JDC in New York".

The JDC adopted its report on 30 November 1998. Its findings of fact, conclusions and recommendation read, in part, as follows:

> "***Findings of fact***
>
> ...
>
> 39. ... [T]he Panel agreed ... that the situation could have been handled in a more sensitive way, for example, premature media exposure could have been prevented, and the process of his eviction from the UNOV premises by four Security Officers was an exaggerated and unnecessarily humiliating gesture.
>
> ...
>
> ***Conclusions***

65. … [T]he Panel felt that OIOS should have conducted a more thorough investigation into the background, motives and overall circumstances that had led to the filing of the complaint by [the junior professional staff member] ...

66. … [T]he Panel deduced … [that]:

(i) [The junior professional], himself or in conjunction with his wife, being aware of [the Applicant]'s reputed attraction to young Arab men, decided that [the junior professional] would befriend and cultivate [the Applicant], most probably in order to try to arrange some improvement in [the junior professional's wife]'s workplace or simply to have a high-ranking friend who might prove useful …

(ii) After two years of trying to develop this relationship and steer it to his advantage, … [s]eeking to end the relationship that was getting out of control, [the junior professional] then gathered compromising evidence, including taping the conversation in the car, and filed his complaint in June 1997.

67. Of paramount importance to the Panel was [the Applicant]'s conduct in the whole episode with [the junior professional]. The Panel felt that the fact that [the Applicant] had allowed himself to be involved in an inappropriately intimate relationship with a junior staff member, a person whose relations with [the Applicant] were initially based on [the Applicant] counseling him on his family and other problems, demonstrated a serious lack of discretion and judgement that had negative impact on the working environment in UNOV.

The Panel would have expected that a staff member with the level and experience of [the Applicant], as a senior official responsible for administration and personnel, would have anticipated that the relationship he apparently sought with [the junior professional] could only have been distorted by the difference between their rank and position and interests.

68. The Panel therefore concluded that the conduct of [the Applicant] in this matter was incompatible with the standards of conduct expected of a staff member of his position, and constituted a breach of his obligation to the United Nations.

VIII. *Recommendation*

69. In light of the foregoing, the Panel *unanimously agreed* that the Administration had failed to prove with adequate evidence that [the Applicant] had made unwelcome sexual advances to [the junior professional], or that [the Applicant] had abused his authority in the relationship with [the junior professional]. Therefore, the charge of sexual harassment fails.

70. The Panel also *unanimously agreed* that the Administration had not presented adequate evidence to show that [the Applicantj's actions in his attempt to discredit [the junior professional] were acts of retaliation against [the junior professional].

71. However, the Panel *unanimously agreed* that by using officials at UNOV and by using his influence and high position in his action to discredit [the junior professional], [the Applicant] had abused his authority as a Director in Vienna.

72. Most importantly, the Panel *unanimously agreed* that [the Applicant]'s conduct in handling the whole matter, entertaining an intimate personal relationship with a junior UNOV staff member, whose wife also had administrative difficulties over which [the Applicant], as head of UNOV Administration had considerable influence, was incompatible with the standards of conduct expected of a staff member of his position and constituted breach of his obligation to the United Nations.

73. In light of the foregoing and in view of the serious nature of the misconduct, the Panel *unanimously recommends* that [the Applicant] be demoted to the D-1 level with immediate effect and with no possibility for promotion.

..."

On 16 December 1998, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

"...

... The Secretary-General has taken note of the Committee's opinion that the requirements of due process have been complied with by the Administration in your case and that there were no procedural flaws that precluded the Committee's consideration of the substance of this case.

In respect of the charge of sexual harassment of [the junior professional], the Secretary-General has taken note of, and agrees with, the Committee's finding that it was not proved with adequate evidence that you had made unwelcome sexual advances to [the junior professional], and that, therefore, the charge of sexual harassment failed.

In respect of the charge of retaliatory action against [the junior professional], the Secretary-General has taken note of, and agrees with, the Committee's finding that your actions were defensive in nature, that they were aimed at undermining the credibility of [the junior professional] as a witness since the case rested on credibility, and that no adequate evidence had been adduced to show that those actions constituted a reprisal within the meaning of paragraph 18 (f) of ST/SGB/273 ... Therefore, the charge of retaliatory action fails.

In respect of the charge of abuse of authority, the Secretary-General has taken note of, and agrees with, the Committee's finding that, while you had not abused your authority in the relationship with [the junior professional], you had abused your authority as the Director of Administration of UNOV ... The Secretary-General also considers that your omitting to take appropriate action on the issues that were the subject of your complaint to OIOS ... when you first became aware of them, impugns your managerial and administrative conduct as you improperly decided not to take timely action in respect of these issues because of your relationship with [the junior professional].

The Secretary-General also considers that your conduct in handling the whole matter, entertaining an intimate personal relationship with another UNOV staff member whose wife had administrative difficulties, over which you, as Head of Administration, had considerable influence which you also applied, was incompatible with the standards of conduct expected of a staff member of your position. Finally, the Secretary-General considers that your conduct during the investigation whereby you continuously lied to the investigators about the true nature of your relationship with [the junior professional] and admitted it only after faced with irrefutable evidence, was also incompatible with the standards of conduct expected of an international civil servant.

In view of the foregoing, the Secretary-General is in agreement with the Committees' conclusion that your actions constituted misconduct within the meaning of staff rule 110.1. The Secretary-General further considers that your conduct violated in particular staff regulations 1.4 and 1.5.

... [T]he Secretary-General has decided that you be demoted to the D-1 level with effect from close of business on the day you receive this letter and, taking into account that you shall reach the retirement age on 5 April 2000, with no possibility for promotion.

..."

On 19 January 1999, the Under-Secretary-General for Management, informed the Applicant that he had been assigned to the position of Chief, Conference and General Service Division, Economic Commission for Africa, in Addis Ababa. The Applicant did not receive medical clearance to take up this position and resigned from the Organization, effective 28 February 1999.

On 23 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the Secretary-General was based upon an allegation with which he was not initially presented.

2. The Applicant's actions in defending himself did not constitute abuse of authority.

3. There is no basis for the finding of the Secretary-General that the Applicant failed to take appropriate action on the issues that were the subject of his complaint to OIOS when he first became aware of them.

4. There is no evidence to show that the Applicant "continuously lied" to the investigators about his relationship with the junior professional.

5. The JDC violated the applicable procedures by not including a synopsis of the evidence in the report.

6. The recommendation of the JDC was based in part on evidence not made available to the Applicant.

7. The failure of OIOS to conduct a proper investigation led to an unnecessary disciplinary procedure against the Applicant, including his suspension.

8. Actions taken by the United Nations at the time of the Applicant's suspension and immediately thereafter were unnecessarily harsh and public.

Whereas the Respondent's principal contentions are:

1. The decision to impose a disciplinary measure upon the Applicant was based on the finding that his action constituted misconduct with which he had been originally charged.

2. The Applicant's due process rights were fully respected.

The Tribunal, having deliberated from 5 to 23 July 2001, now pronounces the following judgement:

I. The Applicant appeals the decision to demote him from the D-2 to the D-1 level with no possibility of promotion. He claims that his demotion was based on a different charge than

the one initially brought against him and that such a shift in grounds violates his rights of due process. Further, he claims that the actions taken by the Organization at the time of his suspension were unnecessarily public and harsh.

II. The case concerns two issues: (i) whether there was a shift in grounds as to one of the charges made against the Applicant during the disciplinary proceedings and (ii) whether the Applicant incurred unwarranted humiliation following the OIOS investigation.

III. On 26 June 1997, a junior professional staff member serving with UNDCP, Vienna, sent a letter to the Under-Secretary-General for Internal Oversight Services as a result of which an investigation was initiated against the Applicant. The OIOS report recommended that the Secretary-General institute disciplinary proceedings against the Applicant.

On 20 January 1998, the Applicant was asked to leave the premises of UNOV and was escorted out of the building by security officers. On 22 January 1998, the Assistant Secretary-General, OHRM, formally charged the Applicant with misconduct, specifically "abuse of authority, sexual harassment of [the] junior [professional] staff member, and retaliatory action against that same staff member". On 30 March 1998, the Applicant refuted all three allegations.

IV. The case was referred to the JDC in New York at the request of the Applicant. The Panel noted that the Applicant was charged with retaliatory action, sexual harassment and abuse of authority. It found that the charge of retaliatory action failed because the Applicant's actions were aimed at undermining the credibility of the junior professional staff member, rather than acts of retaliation.

The Panel dismissed the charge of sexual harassment based on its findings that the relationship between the two men was reciprocal. In this regard, the Tribunal does not agree with the JDC conclusion that a *prima facie* consensual relationship between parties cannot constitute sexual harassment. In this case, the fact that the Applicant was of a higher rank than the junior professional staff member may indicate that there was not, in fact, valid consent, as it is the Tribunal's view that consent can be vitiated by a power imbalance between the parties.

With reference to the third charge, the Panel found that by using officials at UNOV and his influence and high position in an attempt to discredit the junior professional staff member, the Applicant had abused his authority as a Director in Vienna. Further, the JDC found,

> "[the Applicant's] conduct in handling the whole matter, entertaining an intimate personal relationship with a junior UNOV staff member, whose wife also had administrative difficulties over which [the Applicant], as head of UNOV Administration had considerable influence, was incompatible with the standards of conduct expected of a staff member of his position and constituted breach of his obligation to the United Nations."

The JDC recommended that the Applicant be demoted to the D-1 level with no possibility of promotion, with immediate effect, which recommendation was accepted by the Secretary-General.

VI. The Applicant's primary contention is that the decision of the Secretary-General to demote him was based on an allegation with which he was not initially presented, i.e., abuse of authority, in violation of staff rule 110.4. This rule provides that staff members should be given a reasonable opportunity to respond to allegations made against them. The Applicant argues strenuously that the charge of abuse of authority should have been dismissed, either because it was not charged *ab initio* or because the ultimate finding did not relate to the grounds on which the charge was originally made. The facts point otherwise: the charge of "abuse of authority" came early enough so that the Applicant had an opportunity to defend himself. Contrary to the Applicant's assertions, the charge of "abuse of authority" was made nine months prior to the hearing before the JDC. The fact that additional evidence supporting a charge of "abuse of authority" emerged during the hearings, could not vitiate the original charge and is not a valid basis to claim a "shift in grounds". (See Judgement No. 744, *Eren* (1995).)

Moreover, the Application misrepresents the facts in this matter. First, the Applicant deliberately misquoted the Secretary-General. The Applicant states

> "[t]he Secretary-General also agreed with the JDC that the charge of retaliatory action against [the junior professional staff member] failed, since the actions taken by the [Applicant] 'were defensive in nature', that they were aimed at

> undermining the credibility of [the junior professional staff member] as a witness since the case rested on credibility".

What the Secretary-General actually wrote was,

> "actions [taken by the Applicant] were defensive in nature, that they were aimed at undermining the credibility of [the junior professional staff member] as a witness since the case rested on credibility, *and that no adequate evidence had been adduced to show that those actions constituted a reprisal ... Therefore, the charge of retaliatory action fails."* (Emphasis added)

In omitting the emphasized phrase, the Applicant purports to convince the Tribunal that the Secretary-General dismissed the charge of 'abuse of authority' whereas what he actually dismissed was the charge of reprisal.

The Applicant purports to rely on *Eren,* wherein the Tribunal reversed a decision of the Secretary-General accepting a JDC finding of not guilty but nevertheless imposing disciplinary measures for substandard performance. As the parties in that case had not been notified that their performance was under review, the imposition of the disciplinary measures raised due process concerns. The rationale of *Eren* is that being informed of the charges against oneself is fundamental to the right to make a defense. In the instant case, the Tribunal has considered whether the Applicant was sufficiently informed of the charges against him to permit him to make a defense. The Tribunal finds that he was so informed and that his due process rights were fully respected. The Tribunal finds also that as all the charges against him arose from the same factual situation, the Applicant had full and fair opportunity to defend himself. This may be contrasted with the facts in *Eren*, where the investigation unearthed substandard performance ancillary to the original charge.

VII. The Tribunal notes that the Secretary-General based his finding of "abuse of authority" in part on the fact that the Applicant used officials at UNOV, his influence and high position in actions to discredit the junior professional staff member. It is unquestionably within the broad discretionary powers of the Secretary-General to impose disciplinary measures of a more lenient nature than those originally recommended. What may not have constituted reprisal meriting the Applicant's dismissal was nonetheless an abuse of authority meriting demotion.

In cases of misconduct, the Tribunal has repeatedly held that the discretion of the Secretary-General is, and must remain, necessarily extensive (Judgement No. 351, *Herrera* (1985)) and that he has broad discretionary power in determining disciplinary sanctions (see Judgements No. 674, *Gonda* (1994) and No. 941, *Kiwanuka* (1999)). It is not necessary to establish beyond any reasonable doubt a patent intent to commit irregularities or sole responsibility therefore. The Tribunal finds that the Secretary-General was justified in demoting the Applicant for conduct incompatible with the standards of conduct expected of an international civil servant.

VIII. The Applicant's secondary claim rests on the fact that actions taken by the Respondent at the time of the suspension, and immediately thereafter, were unnecessarily public and harsh. During the hearings, the JDC was surprised and dismayed by the OIOS decision to make public aspects of the results of its preliminary investigation in its annual report to the General Assembly, when it knew that the case was under active consideration.

A letter informing the Applicant of his suspension without pay was delivered by four staff members, and he was escorted from the Vienna International Center by four UN security officers. Additionally, an official statement was issued to the major Austrian daily newspaper on the Applicant's suspension, identifying characteristics and details of the case, including allegations of homosexuality and sexual harassment. This was followed by a press release containing the Applicant's name, nationality and status, and details regarding the allegations against him.

The Tribunal finds this conduct unreasonably insensitive and public. Both the humiliation that resulted from the manner in which the Applicant was escorted from his office and the publication of the allegations against him were unnecessary and inappropriate.

IX. In conclusion, the Tribunal holds that the Secretary-General's decision to demote the Applicant was based on findings of misconduct with which he was originally charged and that the Applicant's rights of due process were fully respected; but that the humiliation brought upon the Applicant was disproportionate and unnecessary, warranting compensation.

X. For the foregoing reasons, the Tribunal:

i) Orders the Respondent to pay the Applicant ten thousand dollars, as compensation for moral damage; and,

ii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary